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COMMENTS

IS A POWER OF SALE IN A MORTGAGE VALID IN INDIANA?

Sec. 13474, Burns' Annotated Indiana Statutes, 1926 (being Sec. 3, ch. 6, Acts 1852; v. 2, p. 239, Revised Statutes of 1852), provides that "no mortgage of real estate or instrument operating as or having the legal effect of a mortgage, hereafter executed, shall authorize the mortgagee to sell the mortgaged premises, but every such sale shall be made under a judicial proceeding." This is a part of the Act on Mortgages.

Sec. 13455, Burns' Annotated Indiana Statutes, 1926 (being Sec. 18, ch. 113, Acts 1852; p. 504, v. 1, Revised Statutes of 1852), provides that "where a power to sell lands shall be given to the grantee in any mortgage or other conveyance intended to secure the payment of money the power shall be deemed a part of the security, and shall vest in any person who shall become entitled to the money so secured to be paid." This is a part of the Act on Trusts and Powers.

The first of the above acts was approved May 4, 1852, and therefore enacted within three days prior to that time.¹ The second was approved June 17, 1852, and therefore was enacted within three days of that time. Both acts, however, went into effect upon the publication of the Acts of 1852 on the 6th day of May, 1853.²

The provisions for the foreclosure of a mortgage³ were approved June 18, 1852, and went into force May 6, 1853. There was no provision in the acts of 1852 for redemption from a sale on execution or foreclosure and apparently the first redemption act was passed in 1861.⁴

It is believed that the profession in Indiana has assumed that Sec. 13474, Burns' Annotated Indiana Statutes 1926, avoiding a power of sale in a mortgage was existing and effective legis-

¹ Sec. 14, Art. 5, Constitution of Indiana, being Sec. 147, Burns' 1926.

² *Lackey v. Coffin*, 7 Ind. 169 (1855).

³ Being Sec. 1170 *et seq.*, Burns' Annotated Indiana Statutes 1926; Sec. 631 *et seq.*, Ch. 1, pt. 1, Acts 1852; p. 176, v. 2, Revised Statutes of 1852.

⁴ See *Bryson v. McCreary*, 102 Ind. 1 (1884).

lation. It is submitted, here, however, that there is an irreconcilable conflict between this section and Sec. 13455, and that the latter having been passed subsequent to the first, repealed it by implication.

There are no cases in Indiana which the author has been able to find which decide the point in question. It is said in the case of the *Eaton and Hamilton Railroad v. Huntington*,⁵ "It is true that the mortgage contains a grant of power to the trustee to take possession, and it is probable that he could have executed the power. A statute of this state, enacted May 4, 1852, indeed forbids a power of sale generally in mortgages, 2 G. & H. 355; but a later statute, approved June 17, 1862 (*sic*), 1 G. & H. 651, authorizes sales by trustees under powers in trust mortgages. See 2 G. & H. 291. Both these statutes may stand, the first, however, as modified by the second. But the power of sale in the mortgage did not exclude the right of foreclosure by judicial proceeding. It was but a cumulative remedy."

This language is dictum, as the point involved in the case was the validity of a foreclosure proceeding rather than a sale under a power. The interpretation of the statutes is clearly, however, erroneous. What is now Sec. 13455, Burns' Annotated Indiana Statutes 1926, does not declare the validity of a power only where it is in a trust mortgage. The language is "that where a power to sell lands shall be given to the grantee in *any* mortgage or other conveyance intended to secure the payment of money." It is true that the act is entitled "an Act concerning trusts and powers," but the act clearly deals with powers created without the aid of a trustee.

There is no actual decision limiting the statute to a power in a trust mortgage. The only other case mentioning the statutes in question is the case of *Sinclair v. Gungenhauser*,⁶ where the dictum in the case of *Eaton et al. v. Huntington*, *supra*, was copied.⁷ But the case again involved the question of the validity of a foreclosure proceeding rather than a sale under a power.

There is involved a question of the proper construction of these apparently conflicting statutes. There is a presumption

⁵ 20 Ind. 457, 464 (1863).

⁶ 179 Ind. 78, 122 (1912).

⁷ The case of *Baldwin v. Moroney*, 173 Ind. 474, 582, cited in v. 3, Burns' Annotated Indiana Statutes 1926, p. 1552, as holding that Sec. 13474, *supra*, forbids a power of sale in the mortgage does not decide or mention the point.

against repeal by implication, particularly where the acts are passed at the same session of the Legislature; but in the event that there is an irreconcilable conflict between the acts the latter in point of time must be given effect.⁸ The fact that under the provision of the Constitution⁹ the acts did not go into effect until publication and that they were published on the same day would seem to be immaterial. At least all that could be said would be that thereby they were parts of the same legislation and the rule would then apply that the sections having a later position in the act are to be given effect over conflicting provisions which appear prior to them.¹⁰ The result would be again that the act on powers having been enacted subsequent to the act on mortgages would prevail.

The sole question would seem therefore to be as to whether or not there is an irreconcilable conflict between the two provisions. It cannot be said as indicated in the case of *Eaton, etc., Railroad v. Huntington*, that one is general and that one is special and that therefore both may stand, because it is clear that the subject-matters of both enactments are identical. Sec. 13455, *supra*, deals with a "power to sell land in any mortgage or other conveyance intended to secure the payment of money" and Sec. 13474 deals with a power to sell in a "mortgage of real estate or instrument operating as or having the legal effect of a mortgage." It is true that this last section deals only with mortgages or instruments "hereafter executed," but there being no intention to extend Sec. 13455 to powers executed prior to the enactment the result would necessarily be that it also applied only to powers executed after the enactment.¹¹

Sec. 13474 then makes invalid a power given to a mortgagee to sell the mortgaged premises and Sec. 13455 makes such a power of sale valid.

There would seem to be no possible construction of the language of the statutes which would remove that conflict. It is submitted that the result must be that Sec. 13474 was repealed by Sec. 13455 and that a power of sale in a mortgage is valid. The act on foreclosures is as was said in the case of *Eaton, etc.*,

⁸ *Cleveland, etc., Railroad v. Blind*, 182 Ind. 398, 413 (1914). *Shank v. State*, 183 Ind. 298, 303 (1915).

⁹ Sec. 28, Art. 4, Constitution of Indiana, being Sec. 131, Burns' 1926.

¹⁰ *State ex rel. v. Board of Commissioners*, 170 Ind. 595, 601 (1908).

¹¹ There is at least one decision to the effect that it was not retroactive. See *Wheeler v. Hart*, 7 Ind. 584 (1856).

Railroad v. Huntington, *supra*, cumulative. It was enacted subsequent to the other acts in question, to wit: June 18, 1852, but it says that the "mortgagee *may* foreclose by judicial proceedings." The act concerning the redemption of real estate sold on execution or foreclosure would seem to have no effect upon the question involved here. It applies only "whenever any real estate or interest therein shall be sold by the sheriff on execution or decretal order." c. 88, Acts 1881, p. 591.

The result is that a sale under a power of sale is valid and that the right of redemption would be thus cut off. There being no statute on the subject the manner of sale under such a power of sale would of course be governed by the rules of equity and the common law and could be made without notice to the mortgagor.¹² The title of the purchaser would relate back to the time of the execution of the power and intervening interests would be cut off.¹³

The only argument of any force against the conclusion here reached is that after all the statute on powers¹⁴ was passed upon the assumption that the law of seisin prohibited a power unsupported by a conveyance to a trustee.¹⁵ There is no general statute in Indiana abolishing the law of seisin.¹⁶ The first answer to that is that by practice and judicial recognition of the results the law of seisin has in effect been abolished here also. Even in the so-called common law states that has been the result.¹⁷ The second answer is that by its express terms the statute in question abolishes it, for it makes valid a power of sale given to the "grantee in *any* mortgage." It is impossible to escape the effect of that language by any refinement of it. And it is hard to see how a so-called trust mortgage would help any here. Such an instrument does not pass legal title any more than does the conventional mortgage.¹⁸ The purpose of a trustee here is to hold the legal title for the future exercise of the power, so that title passes to the purchaser under the exercise of the power of sale, under the Statute of Uses. If he has

¹² 3 Tiffany, Real Property, 2nd ed. (1920), p. 2720.

¹³ *Ibid.*, p. 2727.

¹⁴ 13455, Burns', *supra*.

¹⁵ 1 Tiffany, *op. cit.*, *supra*, note 12, p. 1056.

¹⁶ Sec. 13413, 13414, 13416, Burns' 1926, do not cover this situation.

¹⁷ See 1 Tiffany, *op. cit.*, *supra*, note 12, Sec. 319, and Vol. 3, p. 2710.

¹⁸ The case of *Sinclair v. Gungenhausen* (1912), 179 Ind. 78, 122, 123, so decides.

no legal title under a trust mortgage, a power of sale in a trust mortgage is no better than a power of sale in a conventional mortgage; if they are effective they both operate in defiance of the law of seisin.

Probably the purpose of the act was to make certain only that a valid power of sale was assignable.¹⁹ This, however, only adds strength to the present argument; for if the original power of sale in a mortgage is to be invalid the legislature has done a very peculiar thing if it has made a void power assignable. The only reasonable interpretation of the act is that it gives validity to a power of sale in any mortgage and makes the power pass to the subsequent owners of the indebtedness.

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¹⁹ There was considerable question as to this. See 3 Tiffany, *op. cit.*, *supra*, note 12, p. 2712, *et seq.* But even without the aid of a statute the power of sale, given as security, being a power coupled with an interest became readily assignable. See also Vol. 1, p. 1067, *et seq.*